Supreme Court, U.S.
FILED
JAN 2 8 2014
OFFICE OF THE CLERK

Nos. 13-354 & 13-356

IN THE

Supreme Court of the United States

KATHLEEN SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS

v.

HOBBY LOBBY STORES, INC., ET AL., RESPONDENTS

CONESTOGA WOOD SPECIALTIES CORP., ET AL., PETITIONERS

v.

KATHLEEN SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., RESPONDENTS.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE TENTH AND THIRD CIRCUITS

BRIEF OF *AMICI CURIAE* THE COUNCIL FOR CHRISTIAN COLLEGES & UNIVERSITIES, KUYPER COLLEGE, AND ANDREW V. ABELA IN SUPPORT OF RESPONDENTS HOBBY LOBBY, MARDEL, AND PETITIONER CONESTOGA

MATTHEW T. NELSON
Counsel of Record
JOHN J. BURSCH
WARNER NORCROSS & JUDD LLP
111 Lyon Street N.W.
900 Fifth Third Center
Grand Rapids, MI 49503
(616) 752-2000
mnelson@wnj.com
Counsel for Amici Curiae

Library of Congress
Law Library

QUESTION PRESENTED

Federal regulations implementing the Patient Protection and Affordable Care Act of 2010 compel some employers, including Conestoga Wood Specialties Corp., Hobby Lobby Stores, Inc., and Mardel, Inc., to provide health insurance for FDA-approved contraceptives. *See* 77 Fed. Reg. 8725, 8725 (Feb. 15, 2012). The list of FDA-approved contraceptives includes *ella*, Plan B, and intrauterine devices—all of which can act after conception to terminate a human pregnancy. Because of their religious beliefs, Conestoga, Hobby Lobby, and Mardel, like many other businesses, object to financing the purchase of abortifacients. Are these corporations' rights under the Free Exercise Clause and the Religious Freedom Restoration Act of 1993 violated by requiring them to provide insurance coverage for abortifacient products in contravention to their religious beliefs, or else pay crippling fines?

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICI CURIAE* 1

STATEMENT 3

SUMMARY OF ARGUMENT 9

ARGUMENT 10

I. Corporations can pursue profit while simultaneously exercising religion. 10

A. Various Christian traditions speak to how corporations should conduct business, and suggest that profit be viewed as a means and result of doing business, not a goal. 11

B. The Government's belief that a corporation's principal purpose is to maximize profits is contrary to the American experience. 13

II. Requiring employers with religious objections to pay for abortifacients imposes a substantial burden on religious exercise. 19

CONCLUSION 22

TABLE OF AUTHORITIES

Page(s)

Federal Cases

Church of the Lukumi Babalu Aye, Inc. v. *City of Hialeah*, 508 U.S. 520 (1993) 14

Citizens United v. *Federal Election Commission*, 558 U.S. 310 (2010) 17

Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. *Amos*, 483 U.S. 327 (1987) 14

Employment Division, Department of Human Resources of Oregon v. *Smith*, 494 U.S. 872 (1990) 10, 18

Hobby Lobby Stores, Inc. v. *Sebelius*, 723 F.3d 1114 (10th Cir. 2013) 17

West Virginia State Board of Education v. *Barnette*, 319 U.S. 624 (1943) 18, 21

Wisconsin v. *Yoder*, 406 U.S. 205 (1972) 10

Federal Statutes

26 U.S.C. § 511 17

26 U.S.C. § 512 18

Federal Regulations

77 Fed. Reg. 8725 (Feb. 15, 2012) ii

TABLE OF AUTHORITIES—Continued

Page(s)

Other Authorities

Ayub, Muhammad, *Understanding Islamic Finance* (2007) 4

Burkett, Larry, *Business by the Book*, (1998) 7, 13

Calvin, John, *Commentaries on the Epistle of Paul to the Galatians & Ephesians* 262 (William Pringle trans., 2009) 19

Catechism of the Catholic Church 3, 6, 12

Christian Reformed Church in North America, *Our World Belongs to God* (2008) 13

Drucker, Peter, *The Practice of Management: A Study of the Most Important Function in American Society* (1954) 16

Francis, *Evangelii Gaudium* (2013) 5

Friedman, Hershey H, "The Impact of Jewish Values on Marketing and Business Practices," 21 J. of Macromarketing 74 (2001) 4

John Paul II, *Centesimus annus* (1991) 6, 12

John Paul II, *Evangelium vitae* (1995) 20

John XXIII, *Mater et magistra* (1961) 7

TABLE OF AUTHORITIES—Continued

Page(s)

Keller, Timothy & Leary Alsordf, Katherine, *Every Good Endeavor: Connecting Your Work to God's Work* (2012) 5, 13

Leo XIII, *Rerum novarum* (1891) 6, 7

Pontifical Academy for Life, "Moral Reflections on Vaccines Prepared from Cells Derived from Aborted Human Foetuses" (June 5, 2005) 20

Pontifical Council for Social Communications, "Ethics in Advertising" 6

Pontifical Council of Peace & Justice, *Vocation of the Business Leader* 5, 12

Rienzi, Mark, "God and the Profits: Is There Religious Liberty for Moneymakers?" 21 Geo. Mason L. Rev. 59 (2013) 11, 19

Salzberg, Barry, "Deloitte Perspectives: Business leaders and 'Millenials' agree—the purpose of business is more than just profit," http://globalblogs.deloitte.com/deloitte perspectives/2012/01/business-leaders-and-millennials-agree-purpose-of-business-is-more-than-just-profit.html 15

Schumacher, E.F., *Small is Beautiful: Economics as if People Mattered* (1973) 4

TABLE OF AUTHORITIES—Continued

Page(s)

Spahn, J. Jeffrey, "A New Capitalist Manifesto? Imagining Business in the 21st Century," *Virtual Strategist* (Feb. 2003) 15

United Methodist Church: Our Social Creed, http://www.umc.org/site/c.lwL4KnN1LtH/b.2294683/k.B1A4/Church_and_Society.htm 6

Wesley, John, *The More Excellent Way*, http://new.gbgm-umc.org/umhistory/wesley/sermons/89/ 5

Westminster Shorter Catechism 3

Williams, David K., "A New Capitalist Manifesto: Balancing Profits with Purpose," http://www.forbes.com/sites/davidkwilliams/2012/08/01/a-new-capitalist-manifesto-revisited-balancing-profits-with-purpose/ 15

BRIEF OF THE COUNCIL FOR CHRISTIAN COLLEGES AND UNIVERSITIES, KUYPER COLLEGE, ANDREW V. ABELA AS *AMICI CURIAE* OPPOSING THE GOVERNMENT

Amici curiae, The Council for Christian Colleges and Universities, Kuyper College, and Andrew V. Abela, respectfully submit that the judgment of the Tenth Circuit should be affirmed and the judgment of the Third Circuit should be reversed.[1]

INTEREST OF THE *AMICI CURIAE*

Amici are responsible for instructing generations of religious business students on how their faith and their vocation interact. *Amici* are committed to integrating faith and business practices, and particularly educating their students to exercise religious faith in all realms of society, including business. This instruction is more nuanced and comprehensive than exhorting students to personal piety and prayer. It draws upon rich traditions of working out how faith applies to business practices—how faith should guide labor-management relations, corporate responsibility for the effect of corporate activities on the environment, and how to conduct business without engaging in immoral activity.

---

[1] Pursuant to this Court's Rule 37.6, *amici curiae* state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus curiae* and its counsel made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief, and letters of consent are on file with the Clerk's Office.

The Council for Christian Colleges and Universities (CCCU) is an international association of intentionally Christian colleges and universities. The CCCU exists "[t]o advance the cause of Christ-centered higher education and to help member institutions transform lives by faithfully relating all areas of scholarship and service to biblical truth." CCCU, *About CCCU*, http://www.cccu.org/about. Headquartered in Washington, D.C., the CCCU has 119 members in North America, all of which are fully accredited colleges and universities with curricula rooted in the arts and sciences. The CCCU's members have over 300,000 students enrolled and over 1.5 million alumni.

Kuyper College is a ministry-focused, Christian leadership college that educates Christians to become leaders in ministry, service, healthcare, and business. Located in Grand Rapids, Michigan, Kuyper provides students with the opportunity to see, understand, and live all of life through the lens of the Bible. Kuyper's curriculum is intended to awaken students to the need for possessing a comprehensive, biblical worldview to interact with all aspects of human existence, including business.

Dr. Andrew V. Abela is the founding dean of the School of Business & Economics at The Catholic University of America, which was established with the explicit purpose of providing an education in business and economics based on Catholic social doctrine, a body of religious teachings related to social life, including life in business. The school aims to teach students how to exercise their faith through a career in business. Students read, study, and discuss the core documents of Catholic social

doctrine, and apply them to various business situations in the course of their classes.

STATEMENT

The Government's arguments suggest that when a corporation pursues a religious purpose—like glorifying God through fulfilling a societal need for a given service or engaging in proselytizing—and is also for-profit, the corporation is not exercising religion. But the underlying presupposition that seeking profit is secular and inconsistent with religious exercise is contrary to the teachings of many faiths.

1. Religion plays a central role in many Americans' lives. For these citizens, religion provides answers to questions such as what existence means, and for what purpose we exist:

> "[God] calls man to seek him, to know him, to love him with all his strength." [Catechism of the Catholic Church ¶ 1.]
>
> "And I have not created . . . mankind except to worship Me." [Qur'an 51:56 (Sahih Int'l).]
>
> "Man's chief end is to glorify God, and to enjoy him forever." [Westminster Shorter Catechism, Q&A 1.]

Adherents of various faiths believe that the failure to live *all* aspects of their lives to love, worship, and glorify their god is hypocritical and risks eternal punishment. *E.g.*, Matthew 25:41 (NASB) ("Then He will also say to those on His left, 'Depart from Me, accursed ones, into the eternal fire

which has been prepared for the devil and his angels.'"). Accordingly, being legally required to act in a manner inconsistent with one's faith is no small matter.

2. Various world religions contain teachings that apply to business conduct:

In Judaism, the ethical principles from the Talmud and precepts from the Torah are understood to apply to the practice of business. *See e.g.*, Hershey H. Friedman, "The Impact of Jewish Values on Marketing and Business Practices," 21 J. of Macromarketing 74 (2001).

Islam has strict rules forbidding the charging of interest, and an entire global industry (Islamic Finance) has been created to comply with these rules. *See generally*, Muhammad Ayub, *Understanding Islamic Finance* (2007).

Likewise, Buddhism has implications for all economic activity. E.F. Schumacher, *Small is Beautiful: Economics as if People Mattered* 56-67 (1973).

3. Christianity (in various forms, the religion at issue in these cases) has a long tradition of addressing how service to God affects business. Various Christian traditions, and the Roman Catholic Church in particular, have well developed doctrine applying Christian teachings to business practices.

The starting point for much of these teachings is that Christians should "recognize their work as a true vocation and . . . respond to God's call in the

spirit of true disciples." Pontifical Council of Peace & Justice, *Vocation of the Business Leader* ¶ 87; accord Francis, *Evangelii Gaudium*, #203 (2013) ("Business is a vocation, and a noble vocation, provided that those engaged in it see themselves challenged by a greater meaning in life."). Work is a calling "only if someone else calls you to do it and you do it for them rather than yourself." Timothy Keller & Katherine Leary Alsordf, *Every Good Endeavor: Connecting Your Work to God's Work*, 19 (2012). "Dividing the demands of one's faith from one's work in business is a fundamental error which contributes to much of the damage done by business in our world today . . . ." Pontifical Council of Peace & Justice, *Vocation of the Business Leader* ¶ 10. Thus, from its starting point, this view of a Christian's religious obligations includes the workplace.

Such beliefs were held at the time the Constitution was adopted. In the late 1700s, the famous Methodist pastor John Wesley preached a sermon inquiring "in what spirit do you go through your business? In the spirit of the world, or the Spirit of Christ?" John Wesley, *The More Excellent Way*, III.3, available at http://new.gbgm-umc.org/umhistory/wesley/sermons/89/ (last visited Jan. 23, 2014). Wesley then expounded, "I am afraid thousands of those who are called good Christians do not understand the question. If you act in the Spirit of Christ you carry the end you at first proposed through all your work from first to last. You do everything in the spirit of sacrifice, giving up your will to the will of God; and continually aiming, not at ease, pleasure, or riches; not at anything 'this short

enduring world can give'; but merely at the glory of God." *Ibid.*

Given this history, it is not surprising that Christian leaders have often addressed workplace issues, speaking to numerous topics including the following:

Advertising: "Sometimes advertisers speak of it as part of their task to 'create' needs for products and service . . . . 'If . . . a direct appeal is made to [the customer's] instincts—while ignoring in various ways the reality of the person as intelligent and free—then consumer attitudes and lifestyles can be created which are objectively improper and often damaging to his physical and spiritual health.'" Pontifical Council for Social Communications, "Ethics in Advertising," 10 (quoting John Paul II, *Centesimus annus*, #36 (1991)).

Collective bargaining: "We support the right of employees and employers to organize for collective bargaining." United Methodist Church: Our Social Creed, available at http://www.umc.org/site/c.lwL4KnN1LtH/b.2294683/k.B1A4/Church_and_Society.htm (last visited Jan. 20, 2014).

Fair wages: "A workman's wages should be sufficient to enable him to support himself, his wife and his children." John Paul II, *Centesimus annus*, #8 (1991); accord Leo XIII, *Rerum novarum*, #45 (1891); Catechism of the Catholic Church, ¶ 2434.

"You shall not oppress a hired servant *who is* poor and needy . . . You shall give him his wages on his day before the sun sets, for he is poor and sets

his heart on it; so that he will not cry against you to the LORD and it become sin in you." Deuteronomy 24:14-15 (NASB).

Employee ownership of the company: "It is especially desirable today that workers gradually come to share in the ownership of their company, by ways and in the manner that seem most suitable." John XXIII, *Mater et magistra*, #77 (1961).

Timely payment of creditors: "A Christian who continues to order materials and other supplies when there are already past-due bills is being deceitful." Larry Burkett, *Business by the Book*, Ch.2, § 4 (1998) (citing Proverbs 3:27-28).

Workplace hours: "It is neither just nor human so to grind men down with excessive labor as to stupefy their minds and wear out their bodies. . . . Daily labor, therefore, should be so regulated as not to be protracted over longer hours than strength admits." Leo XIII, *Rerum novarum*, #42 (1891).

There are also numerous books and resources available to assist businesses to conform to Christian belief. The following is a small sample, including many titles that predate the HHS Mandate:

- Robert J. Banks. *Faith in Leadership: How Leaders Live Out Their Faith in Their Work – and Why It Matters* (2000);

- John D. Beckett, *Loving Monday: Succeeding in Business Without Selling Your Soul* (1998);

- Michael L. Budde & Robert W. Brimlow, *Christianity Incorporated* (2007);

- Nicholas Capaldi, ed. *Business and Religion: A Clash of Civilizations?* (2005);

- Richard Chewning, John Eby & Shirley Roels, *Business Through the Eyes of Faith* (1990);

- Wayne Grudem, *Business for the Glory of God: The Bible's Teaching on the Moral Goodness of Business* (2003);

- Lee Hardy, *The Fabric of This World: Inquiries into Calling, Career Choice, and the Design of Human Work* (1990);

- Alexander Hill, *Just Business: Christian Ethics for the Marketplace* (1997);

- Timothy Keller & Katherine Leary Alsordf, *Every Good Endeavor: Connecting Your Work to God's Work* (2012);

- Michael J. Naughton & Helen J. Alford, *Managing as if Faith Mattered* (2001);

- Michael Novak, *Business as a Calling: Work and the Examined Life* (1996);

- Max Stackhouse, Dennis McCann, & Shirley Roels, *On Moral Business: Classical and Contemporary Resources for Ethics in Economic Life* (1995);

- John Visser, *The Crossroads of Poverty and Prosperity: The Impact of Religious Beliefs & Worldviews on Economic Outcomes* (2013);

- Kenman L. Wong, *Business for the Common Cood: A Christian Vision for the Marketplace* (2011); and

- David Wright, *How God Makes the World a Better Place: A Wesleyan Primer on Faith, Work & Economic Transformation* (2012).

4. Throughout the country, businesses engage in various religiously-motivated practices, including closing on Sunday (Chick-fil-a, Inc.), printing Bible references on products (In-N-Out Burger), publishing Bibles and other Christian media (Tyndale House Publishers, Inc.), providing financial advice based on the Bible (Lampo Group, Inc.), producing and selling kosher foods (Hebrew National, whose well-known advertising slogan is "We Answer to a Higher Authority"), offering financial products that are consistent with Islamic teachings about usury (LARIBA American Finance House), placing Bibles and the Book of Mormon in all its hotel rooms (Marriott, Inc.), employing chaplains to provide spiritual counsel to employees (Tyson Foods, Inc.), and taking out full-page newspaper ads to proselytize to non-Christians (Hobby Lobby, Inc.). Every one of these businesses is a profit corporation.

SUMMARY OF ARGUMENT

Pursuit of profit is not incompatible with religious exercise. To the contrary, this Court has explained that whether an activity is religious

depends on the motivation of person engaged in the activity. The American experience demonstrates that for-profit corporations act based on a variety of motives, including the desire to maximize profits, to advance social issues, to exercise the creativity of the entrepreneur and employees, to promote political causes, and to follow religious conviction. The Court has never conditioned a corporation's constitutional rights on whether the entity seeks profits. It should not start now. The Government's position interferes with the free exercise of religion.

ARGUMENT

I. Corporations can pursue profit while simultaneously exercising religion.

This Court has explained that "[t]he free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires." *Emp't Div., Dep't of Human Res. of Or.* v. *Smith*, 494 U.S. 872, 877 (1990). The government may not compel any person to adopt a specific religious belief. *Ibid.* The exercise of religion is more than just belief. It also includes "the performance of (or abstention from) physical acts." *Ibid.* But, to be protected, beliefs and conduct "must be rooted in religious belief." *Wisconsin* v. *Yoder*, 406 U.S. 205, 215 (1972).

A. Various Christian traditions speak to how corporations should conduct business, and suggest that profit be viewed as a means and result of doing business, not a goal.

To determine whether a corporation can "plausibly assert [it is] engaged in religious exercise, [it] must first show that [its] religious beliefs have something to say about the conduct of business . . . ." Mark Rienzi, "God and the Profits: Is There Religious Liberty for Moneymakers?" 21 Geo. Mason L. Rev. 59, 66 (2013). As discussed above, there can be no doubt that Christianity has much to say about how business is conducted.

Christianity also speaks directly to profitmaking. In the Gospel of Luke, Jesus warns to "be on your guard against every form of greed; for not even when one has an abundance does his life consist of his possessions." Luke 12:15 (NASB).

But not all profitmaking is motivated by greed. In Proverbs, the Bible explains that profit is the normal result of labor. Proverbs 14:23; *see* Deuteronomy 8:18 (attributing to God the human ability to create wealth). For example, in the parable of the talents, Jesus tells the story of a master who entrusted various sums of money to three servants. The two to whom larger sums were entrusted used the capital to make more money; the third servant hid the master's money in the ground. The first two servants are praised for their profitable stewardship of the master's money. The third servant is characterized as worthless. Matthew 25:14-30. The parable is an allegory expressing the responsibility of

Christians to engage in service to God in proportion to the blessings that they have received. But it also demonstrates that Jesus recognized profit to be the normal outcome of doing business. Thus, Christianity hardly treats obtaining profit as an anti-religious activity.

Various Christian traditions expressly address profit. The Roman Catholic Church teaches that "[t]he purpose of a business firm is not simply to make a profit, but is to be found in its very existence as a community of persons who in various ways are endeavoring to satisfy their basic needs, and who form a particular group at the service of the whole of society." John Paul II, *Centesimus annus*, #35 (1991). The church teaches that "[a] theory that makes profit the exclusive norm and ultimate end of economic activity is morally unacceptable." Catechism of the Catholic Church ¶ 2424. Profit is necessary to sustain a business, but profitability is not "the most important [indicator] by which business should be judged." Pontifical Council of Peace & Justice, *Vocation of the Business Leader* ¶ 53. Instead, "[p]rofit is like food. An organism must eat, but that is not the overriding purpose of its existence. Profit is a good servant, but it makes a poor master." *Ibid.*

Similarly, the Protestant tradition concludes that viewing work as a calling requires that work be done for more than profit: "Our work is a calling from God. We work for more than wages and manage for more than profit so that mutual respect and the just use of goods and skills may shape the workplace. While we earn or profit, we love our neighbors by providing useful products and services." Christian Reformed Church in North America, *Our World Belongs to God*

¶ 48 (2008). "Corporate profits . . . stewarded wisely, are a healthy means to a good end: They are vital to creating new products to serve customers, giving an adequate return to investors for the use of their money, and paying employees well for their work." Keller, *Every Good Endeavor* at 165-166.

But even within Christianity, there are a diversity of perspectives about profit. For example, Larry Burkett, a Protestant author and financial counselor, wrote that "[e]very Christian in business . . . should work to maximize profits, but not to the exclusion of other key elements of a biblically based business." Burkett, *Business by the Book* at 52.

Thus, not only do various Christian traditions view profitmaking as a normative aspect of business, but their religious belief also makes definitive claims about the relative importance of profitmaking within a corporation.

B. The Government's belief that a corporation's principal purpose is to maximize profits is contrary to the American experience.

The Government contends that non-profit corporations can exercise religion, but profit corporations cannot. (See *Hobby Lobby* v. *Sebelius* Pet. Br. 13, 17-19.) The former is unassailable.[2]

---

[2] Though one judge disagrees, and suggests that churches, synagogues, mosques, and other non-profit corporations merely enjoy associational standing to assert the free-exercise rights of their members. *Korte v. Sebelius*, 735 F.3d 654, 695 (2013)

[Footnote continued on next page]

Many churches and other religious bodies legally exist as non-profit corporations, and the Court has recognized their free-exercise rights. E.g., *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 525-26 (1993); *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints* v. *Amos*, 483 U.S. 327, 330 (1987).

The Government's view that profit corporations are motivated solely by profit—and somehow so different from non-profit corporations that they cannot exercise religion—is contradicted by corporate activity throughout the country. It is also inconsistent with this Court's First Amendment jurisprudence and the tax code. And it is contrary to the teachings of various world religions.

1. The concept that a corporation can take action motivated primarily by a purpose other than maximizing profit is well entrenched in American business.

Business organizations ranging from Forbes to Deloitte have commented on the changing view that the purpose of business is more than maximizing profit. In 2012, the chief executive officer of Deloitte Touche Tohmatsu Ltd., Deloitte's affiliate in Japan, noted that 76% of global business leaders surveyed by Deloitte "believe the value of a company should be

---

[Footnote continued from previous page]
(Rovner, J. dissenting). But even that judge is forced to concede that numerous courts have concluded that non-profit corporations can exercise religion, and can cite no cases adopting her view. *Ibid.*

measured by the positive contribution its core business makes to society, as well as by its profits." Barry Salzberg, "Deloitte Perspectives: Business leaders and 'Millenials' agree—the purpose of business is more than just profit," http://globalblogs.deloitte.com/deloitteperspectives/2012/01/business-leaders-and-millennials-agree-purpose-of-business-is-more-than-just-profit.html (last visited Jan. 21, 2014). Likewise, more than 90% of 1,000 Deloitte employees born after 1981 "believe the success of a business should be measured by more than just profit." *Ibid.*

A recent Forbes internet article noted that even in 2003, half of corporate executives "believed the purpose of business is to contribute to the well being of society." David K. Williams, "A New Capitalist Manifesto: Balancing Profits with Purpose," http://www.forbes.com/sites/davidkwilliams/2012/08/01/a-new-capitalist-manifesto-revisited-balancing-profits-with-purpose/ (last visited Jan. 21, 2014) (referencing J. Jeffrey Spahn, "A New Capitalist Manifesto? Imagining Business in the 21st Century," *Virtual Strategist* (Feb. 2003)).

Management theorist Peter Drucker also disagreed with the Government's view that making a profit is the purpose of a corporation. Drucker wrote "profitability is not the purpose of business enterprise and business activity, but a limiting factor on it. Profit is not the explanation, cause or rationale of business behavior and business decisions, but the test of their validity. If archangels . . . sat in directors' chairs, they would still have to be concerned with profitability despite their total lack of personal interest in making profits." Peter Drucker,

The Practice of Management: A Study of the Most Important Function in American Society 35-36 (1954).

2. Day-to-day American experience shows that corporations frequently act based on a desire to contribute to societal well-being. TOMS Shoes is a California-based company that designs and sells shoes and eyewear. TOMS is known for donating a pair of shoes to someone in need for every pair of shoes it sells. TOMS states that its business is "guided by 1 simple mission. With every product you purchase, TOMS will help a person in need. One for One.®" TOMS Mission Statement, http://www.toms.-com/our-movement/1 (last visited Jan. 21, 2014). TOMS claims to have donated shoes to those in need in more than 60 countries. *Ibid.*

Ben & Jerry's Homemade, Inc. is a Vermont-based ice cream manufacturer that is "dedicated to a sustainable corporate concept of linked prosperity." Ben & Jerry's Mission Statement, http://www.-benjerry.com/activism/mission-statement (last visited Jan. 21, 2014). Ben & Jerry's touts itself as leading with progressive values across its business, and promotes various social causes including marriage equality, campaign-finance reform, and mandatory labeling to identify genetically modified organisms. *See ibid.*

Olsenhaus Pure Vegan is a Florida-based limited liability company that sells "cruelty-free shoes" while providing "peace-of-mind concerning animal advocacy, sustainability, and human rights." Olsenhaus Pure Vegan Policies, http://www.olsen-haus.com/policies (last visited Jan. 21, 2014). The

company was founded not to make profit, but to "merge passions for design, fashion, function and being a voice for animals, the environment, transparent business practices and unwavering values in ethical and social responsibility." About Olsenhaus Pure Vegan, http://www.olsenhaus.com/-about (last visited Jan. 21, 2014).

These examples demonstrate that corporations undertake actions based on a multitude of ethical, moral, and philosophical commitments in addition to, and in some cases instead of, maximizing profit. Not surprisingly, the causes each company advances are consistent with the beliefs of its owners.

3. The Government's view that corporate profit-making and religious exercise are inconsistent contradicts this Court's other First Amendment jurisprudence. For example, in *Citizens United* v. *Federal Election Commission*, 558 U.S. 310, 342-55 (2010), the Court held correctly that the First Amendment protects the free speech rights not only of individuals, but of corporations. This holding is consistent with the experience of Americans who are regularly confronted with corporations taking positions on political and social issues. Logically, if a corporation is capable of expressing political and ideological beliefs, it is also capable of religious expression. *Hobby Lobby Stores, Inc.* v. *Sebelius*, 723 F.3d 1114, 1134-35 (10th Cir. 2013).

4. The Government's view is also contrary to the tax code. The Internal Revenue Code recognizes that non-profit corporations may engage in profit-making activities. Non-profits are subject to tax on "un-related business taxable income." 26 U.S.C. § 511(a).

Unrelated business taxable income is "the gross income from any unrelated trade or business ... regularly carried on by" a non-profit organization "less the deductions allowed by this chapter which are directly connected with the carrying on of such trade or business . . . ." 26 U.S.C. § 512(a)(1). Thus, if a church rents out its facility for GED classes, the profit from the rent is taxable despite the church's non-profit status. But surely that profit does not make the church less religious.

5. The Government's view is also contrary to the teaching of various Christian traditions. As discussed in Part I.A., various traditions explain that corporate profitmaking and religious exercise are not mutually exclusive. The Government's assertion that profit and religious exercise are mutually exclusive is itself a religious determination. But the Government is not allowed to determine what constitutes true religious practice. *Smith*, 494 U.S. at 877 ("The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires"). As Justice Jackson memorably wrote for the Court, "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in . . . religion . . . . If there are any circumstances which permit an exception, they do not now occur to us." *W. Va. State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 642 (1943).

The activities of Hobby Lobby, Mardel, and Conestoga demonstrate that the corporations themselves engage in religious activities with a religious motivation. Indeed, it is hard to comprehend how purchasing advertisements encouraging

people to come "to know Jesus as Lord and Savior," as Hobby Lobby does, can be viewed as anything other than religious exercise.

II. Requiring employers with religious objections to pay for abortifacients imposes a substantial burden on religious exercise.

The Government argues that it is not a substantial burden on an employer's exercise of religion to require that employer to pay for abortifacients the employer believes are immoral. (*Sebelius* v. *Hobby Lobby* Pet. Br. 14.) This is true, the Government says, because the employer's cooperation in paying for such products is too indirect. (*Ibid.*) That may be the Government's belief, but it is not a traditionally held religious belief.

1. Various religious traditions have considered when and to what extent a religious adherent can cooperate with activity that is considered evil. John Calvin, in his commentary on Paul's Epistle to the Ephesians, notes that the biblical injunction against having anything to do with evil requires not just "'that we do not, of our own accord, undertake anything wicked. We must beware of joining or assisting those who do wrong. In short, we must abstain from giving any consent, or advice, or approbation, or assistance . . . .'" Rienzi, "God and the Profits: " 21 Geo. Mason L. Rev. at 72 n.86 (quoting John Calvin, *Commentaries on the Epistle of Paul to the Galatians & Ephesians* 262 (William Pringle trans., 2009)).

The Roman Catholic Church distinguishes between formal cooperation with evil, when a person

"cooperates with the immoral action of another person, sharing in the latter's evil intent"; and material cooperation, when a person cooperates with the immoral action of another person, without sharing his/her evil intention." Pontifical Academy for Life, "Moral Reflections on Vaccines Prepared from Cells Derived from Aborted Human Foetuses" (June 5, 2005). Formal cooperation is always morally illicit. *Ibid.* Material cooperation with another's immoral act may not be wrong in some circumstances, but material cooperation with the immoral taking of a human life "is *always* considered to be morally illicit." *Ibid* (emphasis added).

If a law requires material cooperation with the immoral taking of a human life, Christians are required to abstain despite "the sacrifice of prestigious professional positions or the relinquishing of reasonable hopes of career advancement." John Paul II, *Evangelium vitae* § 74 (1995).

2. The Government's "too indirect" argument also ignores the reality that similar participation is punishable under the criminal law. Consider the following hypothetical: An employer knows that a worker has threatened to kill an ex-spouse. The worker comes to the employer and asks to borrow the employer's gun. If the employer merely provides the employee a paycheck, and the employee uses the money to buy a guy and commit murder, the employer faces no liability. But if the employer provides the gun—or even walks to the gun store and purchases the gun for the employee—then the employer may be liable for aiding and abetting, and is certainly at risk of being prosecuted for reckless endangerment.

Likewise, for religious purposes, there is a momentous distinction between an employer providing wages that an employee may use to purchase drugs, alcohol, and prostitutes, on the one hand, and the government compelling the employer to buy drugs, alcohol, and prostitutes for all employees on the other. And the Government's unwillingness to appreciate the moral difference between the two situations demonstrates the wisdom of withdrawing religious exercise "from the vicissitudes of political controversy." See *Barnette*, 319 U.S. at 638.

From the perspective of an employer who believes as a religious matter that life starts at conception, paying for Plan B, *ella*, and certain intrauterine devices can raise the same specter of moral culpability—not before a civil court, but in a divine tribunal where eternity hangs in the balance. Requiring an employer to choose between going out of business or participating in an activity that, for religious reasons, the employer believes is the unlawful taking of a human life, is a substantial burden on the employer's religious exercise.

* * * * *

The very reason that many religious colleges and universities exist is to propagate their faith through instruction that demonstrates how religious faith is exercised in all subject matters. This instruction is frequently provided in far more nuanced and comprehensive fashion than just engaging in group prayer, exhorting students to personal piety, and singing spiritual songs. Instead, faculty are required to integrate faith into the subjects that they teach,

including business classes. Based on their academic work and the experience of their alumni and students, *amici* know the ramifications of this case to the religious exercise of employers throughout the country is considerable. If the Court agrees that despite the requirements of the Religious Freedom Restoration Act and the Free Exercise clause, the Government is free to compel religious employers to do this, some will be required to choose between violating their religious convictions or forfeiting their property. In some cases, employers will be morally bound to sell or shut down businesses that they have been running for generations. Employers should not be required to choose between their religious beliefs and their livelihood.

CONCLUSION

The judgment of the Third Circuit should be reversed, and the judgment of the Tenth Circuit should be affirmed.

Respectfully submitted,

MATTHEW T. NELSON
Counsel of Record
JOHN J. BURSCH
WARNER NORCROSS & JUDD LLP
111 Lyon Street N.W.
900 Fifth Third Center
Grand Rapids, MI 49503
(616) 752-2000
mnelson@wnj.com

Counsel for Amici Curiae

JANUARY 2014